

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

TODD AUGENBAUM,

Plaintiff,

v.

RC VENTURES LLC and BED BATH &
BEYOND INC.,

Defendants.

Civil Action No. 22-9327

COMPLAINT

Plaintiff Todd Augenbaum, by his attorneys, alleges based upon knowledge with respect to facts relating to himself and upon information and belief, after a review of filings made with the U.S. Securities and Exchange Commission (the “SEC”) by and with respect to Bed Bath & Beyond Inc. (“BBBY” or the “Company”), and a review of other publicly available information, as follows:

INTRODUCTION

1. RC Ventures earned windfall profits by purchasing and then selling BBBY securities within six months while other investors in the Company’s common stock (the “Common Stock”) suffered a dramatic loss when RC Ventures liquidated its position shortly before BBBY announced a dilutive offering of Common Stock to shore up its liquidity. At the time of several of its trades, RC Ventures beneficially owned 10% or more of the Common Stock and at the time RC Ventures sold the Company’s securities, it was a director of BBBY through having its representatives serve on the Company’s board of directors (the “Board”). As a result, RC Ventures is required to disgorge its short-swing trading profits in BBBY securities back to the Company pursuant to the express statutory remedy provided by Section 16(b) of the Securities Exchange Act of 1934 (the “Exchange Act”), 15 U.S.C. §78p(b).

PARTIES

2. Plaintiff Todd Augenbaum is a shareholder of BBY.

3. Defendant RC Ventures LLC (“RC Ventures”) is a Delaware limited liability company which identifies its principal office as being located at PO Box 25250, PMB 30427, Miami, Florida 33102-5250. The principal business of RC Ventures is to hold investments for Ryan Cohen (“Cohen”), who serves as the Manager of RC Ventures.

4. Defendant Bed Bath & Beyond Inc. is incorporated under New York law and maintains its principal executive offices at 650 Liberty Avenue, Union, New Jersey 07083. BBY’s common stock (“Common Stock”) is registered with the SEC pursuant to Section 12(b) of the Exchange Act, 15 U.S.C. §78l(b), and trades under the symbol “BBY” on The Nasdaq Capital Market (“NASDAQ”). The Company is a necessary party because Plaintiff is bringing this action to obtain a recovery for BBY’s benefit.

JURISDICTION AND VENUE

5. Jurisdiction of this Court is proper pursuant to Section 27 of the Exchange Act, 15 U.S.C. §78aa. Venue is properly laid in this District because BBY is incorporated under New York law, much of the trading at issue occurred in this District, in which NASDAQ is located, and the reporting of RC Ventures’ trading in BBY securities was disclosed out of this District.

SUBSTANTIVE ALLEGATIONS

6. BBY operates under the names Bed Bath & Beyond, buybuy BABY, and Harmon, Harmon Face Values, or Face Values and, in its SEC filings, describes itself as an omni-channel retailer selling merchandise in the home, baby, beauty & wellness markets.

7. On November 2, 2021, BBY disclosed that it was advancing its three-year \$1 billion share repurchase program and “expects to repurchase the remaining \$400 million of the program by the end of fiscal 2021, specifically over the third and fourth quarters.”

8. On January 6, 2022, as part of the Company’s Third Quarter Fiscal 2021 Earnings Presentation, the Company reiterated that it had accelerated the remainder of its \$1 billion share repurchase program and estimated that it would repurchase \$275 million in Common Stock during Q4’2021, a quarter that was almost half-way completed.

9. On March 7, 2022, RC Ventures filed a Schedule 13D with the SEC (the “Schedule 13D”) disclosing that between January 13, 2022, and March 3, 2022, RC Ventures made the following purchases of BBBY Common Stock and call options (the “Call Options”) exercisable into Common Stock:

Date of Purchase	Security Purchased	Quantity	Purchase Price	Net Expenditures
2/16/2022	Common Stock	30,000	\$16.23	\$486,840.00
2/22/2022	Common Stock	75,000	\$14.03	\$1,052,325.00
2/24/2022	Common Stock	367,833	\$15.21	\$5,593,268.60
2/24/2022	Common Stock	500,000	\$13.66	\$6,830,000.00
2/24/2022	Common Stock	500,000	\$14.58	\$7,288,500.00
2/24/2022	Common Stock	300,000	\$13.43	\$4,027,800.00
2/25/2022	Common Stock	542,621	\$16.22	\$8,802,940.48
2/25/2022	Common Stock	115,000	\$16.11	\$1,853,110.00
2/28/2022	Common Stock	500,000	\$16.60	\$8,300,500.00
2/28/2022	January 2023 Call Option (\$60 Exercise Price)	4,757	\$0.93	\$443,542.68
2/28/2022	January 2023 Call Option (\$75 Exercise Price)	243	\$0.76	\$18,475.29
3/1/2022	January 2023 Call Option (\$60 Exercise Price)	5,000	\$1.47	\$734,650.00
3/1/2022	January 2023 Call Option (\$60 Exercise Price)	1,500	\$1.41	\$211,725.00
3/1/2022	January 2023 Call Option (\$75 Exercise Price)	201	\$1.08	\$21,714.03
3/1/2022	January 2023 Call Option (\$80 Exercise Price)	5,000	\$0.71	\$355,150.00
3/1/2022	Common Stock	307,341	\$16.94	\$5,207,247.83
3/1/2022	Common Stock	311,660	\$16.76	\$5,222,299.62
3/1/2022	Common Stock	70,545	\$16.68	\$1,176,690.60
3/2/2022	Common Stock	69,516	\$17.25	\$1,199,429.06
3/3/2022	Common Stock	20,484	\$16.81	\$344,315.56

10. The Schedule 13D stated that RC Ventures and its Manager intended to engage in communications with the Board and BBBY's management team regarding opportunities to enhance shareholder value and improve corporate governance. The Schedule 13D also stated that "on March 6, 2022, [RC Ventures and Cohen] delivered a letter to the Board (the 'Letter') encouraging the Board to adjust the [Company's] strategy and explore alternative paths to value creation. Specifically, [RC Ventures and Cohen] expressed their belief that the [Company] should narrow its focus to fortify operations and maintain the right inventory mix to meet demand, while simultaneously exploring strategic alternatives that include separating buybuy Baby, Inc. and a full sale of the [Company]." A copy of the Letter was attached to the Schedule 13D.

11. The Schedule 13D claimed that RC Ventures held 9.8% of BBBY's aggregate shares outstanding "based upon 96,337,713 Shares outstanding as of November 27, 2021 as reported in the [Company's] Quarterly Report on Form 10-Q filed with the Securities and Exchange Commission on January 6, 2022."

12. RC Ventures' calculation of its beneficial ownership interest in the Company was flawed because the denominator was stale, with BBBY having 81,979,000 shares of Common Stock outstanding as of February 26, 2022, which is the number of shares the Company reported to have been outstanding as of that date in the Form 10-K filed with the SEC on April 21, 2022 and as later correctly identified by BBBY in the Company's June 1, 2022, proxy statement (the "Proxy Statement"). *See* ¶16(b), *infra*.

13. Cohen has a wide following among many retail investors based upon his successful investment in GameStop Corp. ("GameStop") in which that company's common stock soared by

more than 2,000%.¹ As a result, the filing of the Schedule 13D caused the price of the Common Stock to increase from its \$16.18 closing price on Friday March 4, 2022, opening at \$30.00 per share on Monday, March 7, 2022, before closing at \$21.71 that day.

14. On March 25, 2022, the Company filed a Form 8-K, and RC Ventures and Cohen filed a first amendment to Schedule 13D, disclosing a cooperation agreement (the “Cooperation Agreement”). The terms of the Cooperation Agreement provided for increasing, and BBBY had already acted to increase, the size of the Board from eleven to fourteen members and appointed Marjorie L. Bowen, Shelly C. Lombard and Benjamin Rosenzweig (the “New Directors”) as directors, each with a term expiring at the Company’s 2022 annual meeting of shareholders (the “2022 Annual Meeting”), at which time the Board would again be reduced to eleven members with the New Directors nominated for re-election. In addition, Ms. Bowen and Mr. Rosenzweig were appointed to a four-member Strategy Committee of the Board, focused on supporting the Board’s oversight and review of a strategic analysis of the Company’s buybuy BABY business. The Company also agreed not to increase the size of the Board beyond eleven members after the 2022 Annual Meeting or to seek to classify the Board, in each case, prior to 120 calendar days prior to the first anniversary of the 2022 Annual Meeting (the “Standstill Period”) without RC Ventures’ consent.

15. The Cooperation Agreement, which was attached as an exhibit to both the Form 8-K and the Schedule 13D, also provided for RC Ventures to replace the New Directors under certain conditions, and that one of the other New Directors would serve as an interim member of any

¹ See <https://www.npr.org/2021/01/28/961349400/gamestop-how-reddit-traders-occupied-wall-streets-turf>.

committee upon which a resigning New Director sat. RC Ventures also agreed not to acquire more than 19.9% of outstanding Common Stock.

16. (a) On June 1, 2022, the Company filed the Proxy Statement with the SEC on Schedule 14A in connection with the 2022 Annual Meeting. Among other things, the Proxy Statement stated (on page 8) that:

In connection with the Cooperation Agreement entered into by the Company and RC Ventures in March 2022, the Company agreed to add Marjorie Bowen, Shelly Lombard and Benjamin Rosenzweig to the Board, and to nominate each of them for election as directors at the Annual Meeting.

(b) The Proxy Statement stated (on pages 74-75) that RC Ventures beneficially owned 11.8% of the Common Stock based upon RC Ventures reporting beneficial ownership of 9,450,100 shares of the Common Stock.

17. On June 29, 2022, the Common Stock tumbled by almost 25%, from a closing price of \$6.53 the prior day, to close at \$4.99 per share in reaction to the Company disclosing poor operating results and that its CEO Mark Tritton had been replaced.

18. On July 15, 2022, the Company filed a Form 8-K with the SEC reporting that the New Directors, together with all the other nominees, had been elected to the Board at the July 14, 2022 Annual Meeting. The Form 8-K also stated that at the close of business on May 16, 2022, there were 79,886,442 shares of Common Stock outstanding.

19. On August 9, 2022, a securities analyst with Baird & Co. downgraded BBBY Common Stock to an “underperform” rating with a \$4.00 per share price target saying that the “frenzied move” in the stock in recent days had been primarily driven by a portion of the market that is not focused on fundamentals. In reaction to the downgrade, the Common Stock declined by approximately 20% to close at \$9.79 per share.

20. On August 12, 2022, Cohen tweeted a reaction to a CNBC story claiming that the Common Stock was overvalued noting in the story's picture that "[a]t least her cart is full." Cohen's tweet was retweeted 1,268 times and received over 10,000 likes with the Common Stock closing at \$12.95 per share on volume of over 80 million shares up, from its previous closing price of \$10.63 per share.

21. On August 16, 2022, RC Ventures amended its Schedule 13D, disclosing that it beneficially owned 11.8% of the Common Stock solely due to a decrease in the number of outstanding shares of Common Stock. The amendment helped fuel a rapid increase in the price of the Common Stock as retail investors mistakenly believed that RC Ventures had increased its position, which in fact had remained static since March, with the only change being RC Ventures and Cohen using the correct denominator to determine their percentage of ownership. The surge of retail buying helped fuel a short squeeze causing the Common Stock to trade up to as much as \$28.35 before closing at \$20.65 per share on volume of over 395 million shares.

22. On August 18, 2022, RC Ventures and Cohen filed a Form 4 with the SEC made both in their capacity as a 10% beneficial owner of the Common Stock and because they *"previously may have been deemed members of a Section 13(d) group* that no longer beneficially owns more than 10% of the [Company's] outstanding shares of Common Stock." (emphasis added).

23. On August 25, 2022, RC Ventures filed another Schedule 13D amendment disclosing that it had sold all of its Common Stock and Call Options in the following transactions:

Date of Sale	Security Sold	Quantity	Weighted Average Sales Price	Net Proceeds
8/16/2022	Common Stock	446,399	\$18.68	\$8,340,880.50
8/16/2022	Common Stock	812,448	\$19.48	\$15,827,884.45
8/16/2022	Common Stock	1,443,818	\$20.78	\$30,007,490.34

Date of Sale	Security Sold	Quantity	Weighted Average Sales Price	Net Proceeds
8/16/2022	Common Stock	1,059,021	\$21.42	\$22,685,225.30
8/16/2022	Common Stock	795,559	\$22.71	\$18,066,627.78
8/16/2022	Common Stock	169,335	\$23.33	\$3,950,477.18
8/16/2022	Common Stock	103,901	\$24.87	\$2,583,869.29
8/16/2022	Common Stock	104,077	\$25.59	\$2,663,526.09
8/16/2022	Common Stock	65,442	\$26.27	\$1,719,252.30
8/17/2022	Common Stock	189,689	\$23.73	\$4,502,023.72
8/17/2022	Common Stock	512,185	\$24.63	\$12,613,380.76
8/17/2022	Common Stock	896,238	\$25.50	\$22,853,810.88
8/17/2022	Common Stock	610,828	\$26.44	\$16,152,254.91
8/17/2022	Common Stock	323,483	\$27.58	\$8,920,242.34
8/17/2022	Common Stock	140,788	\$28.51	\$4,014,177.73
8/17/2022	Common Stock	106,789	\$29.22	\$3,120,290.86
8/17/2022	January 2023 Call Option (\$60 Exercise Price)	7,475	\$6.55	\$4,893,596.96
8/17/2022	January 2023 Call Option (\$60 Exercise Price)	3,782	\$8.62	\$3,259,221.33
8/17/2022	January 2023 Call Option (\$75 Exercise Price)	444	\$5.66	\$251,287.13
8/17/2022	January 2023 Call Option (\$80 Exercise Price)	3,826	\$5.34	\$2,044,354.61
8/17/2022	January 2023 Call Option (\$80 Exercise Price)	1,174	\$7.03	\$824,901.94

24. On August 17, 2022, the Company made the following statement:

We were pleased to have reached a constructive agreement with RC Ventures in March and are committed to maximizing value for all shareholders. We are continuing to execute on our priorities to enhance liquidity, make strategic changes and improve operations to win back customers, and drive cost efficiencies; all to restore our company to its heritage as the best destination for the home, for all stakeholders. Specifically, we have been working expeditiously over the past several weeks with external financial advisors and lenders on strengthening our balance sheet, and the Company will provide more information in an update at the end of this month.

25. On August 31, 2022, the Company issued a press release in which it among other things stated that:

The Company announced it has secured financing commitments for more than \$500 million of new financing, including its newly expanded \$1.13 billion asset-

backed revolving credit facility (“ABL facility”) and a new \$375 million “first-in-last-out” facility (“FILO facility”). The refinancing of the ABL Facility is being led by J.P. Morgan, and Sixth Street Partners is serving as the Lender and Agent for the Company’s FILO facility. The commitments are subject to customary closing conditions. There is no guarantee that the closing conditions will be satisfied, however, the Company anticipates that the closing and funding of the loans will occur imminently. ***Additionally, the Company filed a Form S-3 Registration Statement with the SEC earlier this morning as it prepares for the potential launch of an at the market offering program (“ATM”) for up to 12 million shares of common stock.*** The potential proceeds from an ATM are expected to be used for a number of corporate purposes, including to repurchase or repay some of the Company’s debt. (Emphasis added)

CLAIM FOR RELIEF

26. Plaintiff repeats and realleges every allegation above as if fully set forth herein.

27. This claim is brought against defendant RC Ventures.

28. RC Ventures beneficially owned 10% or more of the Company’s outstanding Common Stock from March 1, 2022 through August 16, 2022 (which is less than six months) during which time, RC Ventures purchased and sold Common Stock at a profit.

29. RC Ventures was also a director of the Company within the meaning of Section 16(b) by virtue of the New Directors’ appointments to the Board.

30. Section 16(b) creates liability for directors, officers and 10% or more beneficial owners of any class of an issuer’s securities. The statute carves out an exception to such liability where a 10% beneficial owner “was not such both at the time of the purchase and sale ... of the security.” The U.S. Court of Appeals for the Second Circuit, utilizing the principle of *expression unius est exclusion alterius*, held that “Section 16(b) is applicable to a short swing transaction even though the person involved was a director only at the time of the sale and not at the time of the purchase.” *Adler v. Klawans*, 267 F.2d 840, 847 (2d Cir. 1959).

31. SEC Rule 16a-2(a), 17 C.F.R. §240.16a-2(a), adopted in 1991, sought to overrule *Adler v. Klawans* by limiting the need for a director to report and, therefore, be subject to Section

16(b) liability, for trades occurring before the time the person is appointed a director. That portion of Rule 16a-2(a) is inconsistent with the statutory language of Section 16(b) as interpreted by the Second Circuit and, therefore, represents an invalid exercise of the SEC’s rulemaking authority. *See, e.g., United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 488 (2012) (“[i]f a court, *employing traditional tools of statutory construction*, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.”) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)) (emphasis added).

ALLEGATIONS AS TO DEMAND

32. On August 2, 2022, Plaintiff made a demand (the “Demand”) on the Board to pursue the claims asserted in this Complaint.

33. On October 21, 2022, counsel for the Company responded to the Demand in a letter refusing to bring suit and stating that “we consider your demand that the Company file a lawsuit or take other action to recover the profits earned by RC Ventures under Section 16(b) to be resolved.”

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against RC Ventures for the benefit of the Company in an amount to be determined at trial, plus pre-judgment interest, post-judgment interest, and such other and further relief as this Court may deem just and proper.

Dated: October 31, 2022

By: /s/ Jeffrey S. Abraham
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